BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals appears at pages 316 to 325 of the Record and is not yet reported.

JURISDICTION OF THIS COURT.

The grounds upon which the jurisdiction of this Court is invoked are stated on page 6 of the petition for writ of certiorari.

STATEMENT OF THE CASE.

A statement of the case appears in the petition for writ of certiorari and the same is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

(1) in holding that the evidence was sufficient to sustain the conviction of petitioner Dave Marglous;

(2) in holding that the evidence was sufficient to sustain the conviction of petitioner Meyer Esstman;

(3) in holding that the evidence was sufficient to establish guilty knowledge and intent upon the part of the petitioners;

(4) in failing to construe the Act to require substantial proof that petitioners were engaged in purchasing distilled spirits with intent to sell the same to trade buyers;

(5) in construing the Act as prohibiting large volume sales to customers unless the dealer proves them to be consumers;

(6) in sustaining the convictions on the basis of inferences drawn from inferences and presumptions resting upon other presumptions;

(7) in setting up a standard of conduct for the liquor dealer which is so vague, indefinite, and uncertain as to furnish no adequate guide;

(8) in constructing a crime from conduct not included in the language of the Act, or reasonably covered by statute or regulation;

(9) in construing the Act to include retail liquor dealers whose operations are wholly intrastate;

(10) in holding that the instructions clearly and fairly presented the case to the jury.

ARGUMENT.

I.

The Act Does Not Require Retail Liquor Dealers to Obtain a Basic Permit.

It is important that this Court authoritatively construe Section 203 (c) (1) of the Federal Alcohol Administration Act which requires a basic permit as a condition for engaging in the true wholesale liquor business.

Every retail dealer who desires to sell liquor in quantities in excess of five wine gallons must obtain a wholesale liquor dealer's stamp and pay the excise therefor.[1] Such dealer does not thereby become a wholesaler except for the limited purposes of the Internal Revenue Code and is not thereby subject to the provisions of the Federal Alcohol Administration Act.[2] The Internal Revenue Code places no limit upon the quantities the dealer who has purchased such a stamp may sell at any one time or to any one person, nor does the Code prohibit sales to any particular class of persons.[3]

The Federal Alcohol Administration Act requires a permit only of one whose business it is to purchase liquor with the intent to resell such liquor at wholesale. The permit provisions have no application to retailers as such. The latter is not required to obtain a permit and in fact cannot obtain one. There is no excise or other tax imposed in connection with a wholesaler's basic permit, and the Government derives no revenue therefrom. Hence, no evasion of taxes is involved in this case.

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[1] Section 3250, I. R. C. (a) (3).

[2] Report of Ways and Means Committee, 74th Congress, 1st Session, House Report No. 1542, page 16. "Wholesaler as used in the bill, outside the taxing provisions of Section 1 (which were eliminated before enactment), means a wholesaler in accordance with the usual trade understanding and not as defined in the Internal Revenue laws for tax purposes."

[3] Section 3254, I. R. C.

II.

The Act Does Not Prohibit or Regulate Quantity Sales and May Not Properly Be Construed to Make Such Sales Unlawful.

The word "wholesale" has different meanings in different situations. Generally it means sales of goods in gross to dealers who sell to consumers. **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.**, 227 Fed. 46, 47-48. Under the Internal Revenue Code the meaning of "wholesale" is dependent upon the quantity sold. Whether the Secretary might validly have promulgated a regulation under the Act defining "wholesale" as meaning sales in excess of specified quantities need not be decided because **he did not do so.** The "controlling regulation" of the Federal Alcohol Administration (quoted by the Circuit Court of Appeals, R. 317) defines "resale at wholesale" as meaning a "sale to any trade buyer." A trade buyer is a retailer or wholesaler.

Thus, as clarified by the regulation in effect at the time in question in 1943 (and still in effect), the Act requires a permit only of those persons who purchase liquor with the intent to sell the same to trade buyers. Dealers were, therefore, put on notice that unless a permit were in effect they could not legally **purchase** liquor with the intention of ultimately selling that liquor to other dealers. They were, however, given no notice or warning that sales of liquor in any particular (or unspecified) quantities were prohibited or even affected by the Act.

What the Circuit Court of Appeals in effect did is what the Secretary did not do, namely, declare that sales in quantity were presumptively knowingly made to dealers.

The crux of this case is that petitioners (through their clerks) made several sales in quantity and that some of the purchasers could not later be found by the Government. The Circuit Court of Appeals held as a matter of

law that the quantities so sold were in excess of "normal individual consumption requirements"; and that in the absence of explanation it may be inferred not only that the purchasers were dealers but that petitioners knew that they were dealers, and hence that petitioners originally purchased the liquor for sale to dealers. The Court did not indicate what explanation was required of petitioners, and certainly if an explanation were made a jury would not be required to believe it. Hence, so far as the meaning and application of the Act as construed by the Circuit Court of Appeals is concerned, it can make no difference whether or not an explanation is offered.

There is concededly no evidence in the record that petitioners knew that the quantity buyers were dealers, if in fact they were, or that petitioners intended to sell to known trade buyers. The Circuit Court of Appeals held in effect, however, that such knowledge and intention were proved by the fact that petitioners made sales in quantities "in excess of normal individual consumption requirements" even though the sales themselves were legal. All of the inferences and presumptions upon the basis of which the convictions were affirmed rest upon the conclusion of the Circuit Court of Appeals that the quantities sold were in excess of "normal individual consumption requirements."

The Secretary has not promulgated any regulation which warns the dealer as to what quantities he may safely sell. Nor has any regulation been promulgated which requires a liquor dealer to sell at his peril or which imposes upon him a duty of investigating the business and purpose of his customer or of the name and address furnished by such customer to him. For a regulation which does furnish a guide to a retail dealer under another statute, see **United Cigar Stores Whelan Corp. v. United States**, 113 Fed. (2d) 340.

In the instant case it is the Circuit Court of Appeals which ex post facto lays down the rule that if a purchaser

cannot be found and the quantity is in excess of "normal individual consumption requirements," then irrespective of whether there is any circumstance to show that petitioners knew the purchasers were dealers, if they were, the jury may properly find that petitioners were engaged in the business of purchasing liquor with the intention of selling the same to trade buyers.

In view of the large number of retail liquor dealers who have purchased wholesale tax stamps authorizing sales in quantity, it is submitted that there is urgent necessity for a ruling by this Court as to the meaning and application of Section 203 (c) (1) of the Act. Retail liquor dealers cannot possibly engage in their normal business operations if they must guess as to what constitutes "normal individual consumption requirements." This is all the more true with respect to those dealers who, like petitioners, make all their sales on the store premises and do not deliver any merchandise and whose record of the sales contains the names and addresses of the buyers as given to the clerks making the sales. Surely if Congress intended to prohibit volume sales or sales pursuant to a wholesale tax stamp, unless a permit is first obtained, language was readily available to express such thought. Yet the Circuit Court of Appeals in effect held that one is engaged in the business of purchasing distilled spirits for the purpose of sale to dealers, if the evidence shows sales of liquor in larger than "normal" quantities. Such decision can mean only that the Act prohibits a person from engaging in the business of making occasional sales of liquor in quantities in excess of "normal individual consumption requirements" unless the dealer can conclusively show that the purchasers were not in fact trade buyers.

III.

The Decision of the Circuit Court of Appeals Conflicts With Decisions of This Court.

a) **The decision broadens the statute beyond the fair meaning of the language used.**

This construction of the statute is not only unjust because of the absence of any prior warning or notice to petitioners as to what a dealer can or cannot do, but is also unreasonable and a violation of due process. In the first place, the Court, in effect, has made the doing of a lawful act, to-wit, sales of liquor in quantities authorized by their wholesale tax stamp, a crime although such conduct is not made a crime by the language of the Act or fairly inferred therefrom.

The Act merely denounces the business of "purchasing" liquor for specified purposes. There was no evidence that petitioners made any purchases or that they intended to sell to trade buyers. The Circuit Court of Appeals, therefore, made that a crime which is not made a crime by the Act of Congress.

In **United States v. Wiltberger,** 5 Wheat. 76, 95, 96, this Court stated:

> "It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * * To determine that a case is within the intention of a statute, its language must authorize us to say so."

In **United States v. Resnick,** 299 U. S. 207, this Court held as follows:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. * * * Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses."

The Act here involved was not intended to apply to businesses such as that of petitioners, whose operations both with respect to purchases and sales are wholly intrastate in character. To construe the Act as the Circuit Court of Appeals has done, to include such businesses, raises serious constitutional objections and is inconsistent with the intent of Congress.[1]

By making intrastate sales the controlling factor, rather than purchases made with the intent to sell to dealers, the Circuit Court of Appeals has completely overlooked the clear intent of Congress. Subsection (c) of Section 203 of the Act is divided into two subparagraphs. The first subparagraph, under which petitioners were indicted, involves one of the two elements of the true wholesale business, namely, the purchase of the liquor for the purpose and with the intent of selling to trade buyers. The second subparagraph involves the other element of the true wholesale business, namely, the sale of liquor. However, the only sales which are affected by the Act are those made by a person engaged in the business of purchasing for resale at wholesale, and then only that portion of sales as are made in interstate or foreign commerce of liquor which was initially purchased for resale at wholesale.

The Circuit Court of Appeals has construed the Act to prohibit sales in intrastate commerce of liquor not shown by the evidence to have been purchased for resale to trade buyers, irrespective of whether the seller is engaged in the business defined in subparagraph 1.

This decision clearly conflicts with the applicable decisions of this Court holding that a statute may not be enlarged beyond the fair meaning of the language used.

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1 Report of Ways and Means Committee, 74th Congress, 1st Session, House Report 1542, page 6. ". . . No permits are provided for brewers or retailers. . . . No permit authority is required for sale or other disposition in intrastate commerce or for warehousing, except in connection with bottling of distilled spirits." See also Hearings before the Committee on Ways and Means, 74th Congress, 1st Session, House Report 8539, page 26.

b) **The Circuit Court of Appeals has set up a standard of conduct too vague and indefinite to afford due process of law.**

Moreover, the uncertain standard thus set up by the Court leads to conjecture and surmise as to what conduct comes within the scope of the Act. There is no such guide known to the law as "normal individual consumption requirements" with respect to the purchase of liquor. The dealer is required to guess as to what quantity he may sell before the inference is to be drawn that the purchaser is a trade buyer.

This Court has recently ruled that the same rule must apply to administrative regulations as is applied to statutes defining criminal action, namely, that the provisions must be explicit and unambiguous and must adequately inform those who are subject to their terms what conduct is prohibited in order that the ordinary person can know in advance how to avoid an unlawful course of action. **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946. Other cases holding not consonant with due process of law standards of conduct so vague that men of common intelligence must necessarily guess as to their meaning are: **Connolly v. General Construction Co.**, 269 U. S. 385; **Lanzetta v. New Jersey**, 306 U. S. 451; **Cline v. Frink Dairy Co.**, 274 U. S. 445; **International Harvester Co. v. Kentucky**, 234 U. S. 216, and **Weeds, Inc., v. U. S.**, 255 U. S. 109. The same rule obviously should govern a judge-made standard of conduct.

c) **The Circuit Court of Appeals has drawn inferences from inferences and based presumptions upon presumptions in order to sustain convictions.**

Petitioners respectfully submit that if a conviction for engaging in the business of purchasing liquor for resale at wholesale may rest upon evidence which shows no more

than several quantity sales and that several purchasers could not later be found, and there is no evidence that petitioners knew that any purchaser was a trade buyer or had given an incorrect name or address, or that petitioners intended to sell to trade buyers or that petitioners had made any purchases of liquor with such intent, then such conviction is based entirely on suspicion, conjecture and surmise without any substantial evidence.

The presumptions of guilty knowledge and intent which the Circuit Court of Appeals drew from the fact of quantity sales and the fact that some of the purchasers could not later be found are not supported by logic or the common experience of mankind. The inferences drawn in the present case are more unreasonable and illogical than the statutory presumption which was found unsupportable in **Tot v. United States**, 319 U. S. 463, and the judge-made presumption involved in **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402. The **Tot** case held that possession of a firearm coupled with conviction for a prior crime was not evidence proving that such firearm was shipped or transported in interstate commerce. The **Bollenbach** case held that possession of stolen property in another state other than that in which it was stolen shortly after the theft cannot properly raise the presumption that the possessor transported the property in interstate commerce. The applicable rule is stated as follows in the **Tot** case:

> "There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist, it follows obviously that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all."

In the instant case, the circumstances relied upon by the

court below are entirely without incriminating tendency or effect. Quantity sales are lawful when made by the holder of a Wholesale Tax Stamp.[1] Large purchases by persons other than trade buyers are not unusual and are made quite frequently. The fact that a few purchasers could not be found is no evidence whatever of guilt. Petitioners did not knowingly record an incorrect name and address, and it is significant that the only purchaser shown to have been a trade dealer (Fannie Gladdish) was properly recorded on petitioners' records. Petitioners, of course, had no knowledge that she was a trade buyer.

The fact that the case is based upon circumstantial evidence does not obviate the necessity of proving and not presuming the circumstances. See **United States v. Ross**, 92 U. S. 281, which holds that inferences from inferences or presumptions resting on the basis of another presumption are not permissible. In the **Ross** case this Court held as follows:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. . . . A presumption which the jury is to make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption."

This Court should say whether the statute is reasonably susceptible to the construction placed upon it by the Circuit Court of Appeals and whether, as held by that Court, inference may rest upon inference and presumption upon presumption to sustain a conviction under the Act.

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[1] Government witness Deputy Collector of Internal Revenue Hope testified as follows:

"Q. A person that pays the fee to the United States Government, what is he permitted to do under that application? A. He is permitted to sell liquor in quantity.
Q. What quantities? A. Any amount in excess of five gallons.
Q. A hundred cases? A. Yes, sir; a thousand cases if he wants to" (R. 247).

IV.

The Charge to the Jury Was Wholly Inadequate and Affirmatively Misleading.

A person charged with a crime cannot be said to have had a fair trial unless the jury is fully informed with respect to the elements of the offense charged and is apprised of all the essential facts which they must find from the evidence before a verdict of guilty may be returned. Due process means more than that the jury hear the evidence and then evolve some theory therefrom upon which to find the defendant guilty.

In this case the trial court quoted from the indictment and the statute under which petitioners were charged, stated the "issue boiled down" and then did no more than to inform the jury of the burden of proof and other cautionary instructions. The charge in the present case was worse than no instruction at all because it affirmatively permitted the jury to wander and meander at will through the evidence and to base their verdict on suspicion alone. It will be noted that the various inferences and "permissible" presumptions which the Circuit Court of Appeals held were proper for the jury to draw were not submitted to the jury by the trial court. All that the jury were told with respect to the issues in the case is contained in the one sentence which purported to state the basic issue. This was stated by the trial court as follows:

> "The issue, boiled down, is the charge by the Government that they (petitioners) sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants" (R. 266).

Thus it is apparent that the trial court authorized the

jury to convict the petitioners solely upon the basis of a sale to a trade buyer or buyers, whether or not there was an intention on the part of petitioners to sell to trade buyers and whether or not petitioners knew the purchasers were trade buyers. That this erroneous conception of the law was the Government's trial theory is shown by the argument of the Government's attorney.[1] Moreover, the instruction in effect informed the jury as a matter of law that if they found that sales were made to trade buyers, the petitioners were engaged in the business of purchasing liquor for sale to trade buyers. Thus, so far as the jury were informed, the inference which the Circuit Court of Appeals held "permissible" was made mandatory.

In **Bollenbach v. United States,** 326 U. S. —, 66 S. Ct. 402, it is said:

> "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue."

In the recent case of **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946, this Court again held to the same effect. In the latter case there was a correct statement of the facts necessary to be found by the jury in the charge, as well as the equivocal direction. The Court held that the correct statements were so intertwined with the incorrect charge as to negative their effect.

In the present case there is no correct instruction to the jury in so far as concerns the elements necessary to be found by the jury to authorize a conviction. There is only the incorrect statement as to the issue for the jury's determination. It is true that the petitioners' exception to

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1 "I think, with respect to that transaction (Fannie Gladdish), that we have proved it (the charge) as much as it could be proven. They are charged with the unlawful selling of liquor for the purpose of resale, and we have shown that Fannie Gladdish bought it for purpose of sale, and put it in her stock" (R. 263).

the charge was a general one, but surely an error of such grave character cannot be waived by the general nature of the exception. A person charged with a crime cannot properly be held to have had a fair trial unless the issues for the determination of the jury are adequately and clearly presented to the jury, whether or not a request for a proper instruction is made.

In the case of **Screws v. United States**, 325 U. S. 91, this Court stated that even where no exception at all is taken to the charge, "where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, * * * it is necessary to take note of it" on the Court's own motion.

The Circuit Court of Appeals did not base its decision upon the insufficiency of the exception. The Court held that the instruction "clearly and fairly presented the case to the jury" (R. 322). Petitioners submit that this charge not only misstates the basic issue, but furnished no guide whatever to enable the jury to understand the law as it bore upon the facts of the case. There is an entire want of "a lucid statement of the relevant legal criteria." **Bollenbach v. United States**, supra.

CONCLUSION.

This case involves important questions of federal law with respect to the meaning, scope and application of the Federal Alcohol Administration Act. It further involves important questions concerning the reasonableness of presumptions and inferences drawn from lawful conduct in order to affirm convictions not sustained by the evidence. It also involves the important question whether petitioners have been accorded a fair trial under instructions, which not only fail to inform the jury of the essentials of the offense charged, but affirmatively mislead the jury. For

the reasons set forth in the petition and brief, it is submitted that a writ of certiorari should be granted.

Respectfully submitted,

LOUIS B. SHER,
582 Arcade Building,
St. Louis, Missouri,
Attorney for Petitioners.

Joseph Nessenfeld,
Maurice L. Mushlin,
St. Louis, Missouri,
Of Counsel.